

MT LEGISLATIVE HISTORY

Chapter 324 1991

Bill H _____ S 7

Original bill & hist. ☒ C

H. Committee on Judiciary

S. Committee on Judiciary

Hearing Date(s) Mar 12 ☒ C

Hearing Date(s) Jan 22 ☒ C

Mar 13 ☒ C

Feb 23 ☒ C

_____ ☐ C

_____ ☐ C

_____ ☐ C

_____ ☐ C

Date Out Mar 13 ☒ C

Feb 23 ☒ C

Did this bill originate in an interim committee? ☐ Yes ☐ No

Committee _____

Report _____

SENATE FINAL STATUS

SB 7

1/11	2ND READING PASSED	50	0
1/12	3RD READING PASSED	49	0
	TRANSMITTED TO HOUSE		
1/14	FIRST READING		
1/14	REFERRED TO BUSINESS & ECONOMIC DEVELOPMENT		
1/18	HEARING		
1/18	COMMITTEE REPORT—BILL CONCURRED		
1/19	2ND READING CONCURRED	93	2
1/21	3RD READING CONCURRED	94	3
	RETURNED TO SENATE		
1/23	SIGNED BY PRESIDENT		
1/24	SIGNED BY SPEAKER		
1/25	TRANSMITTED TO GOVERNOR		
1/29	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 2		

EFFECTIVE DATE: 1/29/91

SB 6 INTRODUCED BY MAZUREK

REVISE UNIFORM STATUTORY RULE AGAINST PERPETUITIES

12/27	INTRODUCED		
12/28	REFERRED TO JUDICIARY		
1/07	FIRST READING		
1/16	HEARING		
1/18	COMMITTEE REPORT—BILL PASSED		
1/21	2ND READING PASSED	46	0
1/22	3RD READING PASSED	48	0
	TRANSMITTED TO HOUSE		
1/23	FIRST READING		
1/23	REFERRED TO JUDICIARY		
2/04	HEARING		
2/04	COMMITTEE REPORT—BILL CONCURRED		
2/05	2ND READING CONCURRED	97	2
2/06	3RD READING CONCURRED	99	0
	RETURNED TO SENATE		
2/11	SIGNED BY PRESIDENT		
2/11	SIGNED BY SPEAKER		
2/11	TRANSMITTED TO GOVERNOR		
2/15	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 26		

EFFECTIVE DATE: 10/01/91

SB 7 INTRODUCED BY MAZUREK

REPLACE UNIFORM FRAUDULENT CONVEYANCES ACT WITH
UNIFORM FRAUDULENT TRANSFER ACT

12/27	INTRODUCED		
12/28	REFERRED TO JUDICIARY		
1/07	FIRST READING		
1/22	HEARING		
2/23	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/25	2ND READING PASSED	48	0
2/26	3RD READING PASSED	49	0
	TRANSMITTED TO HOUSE		
3/04	FIRST READING		
3/04	REFERRED TO JUDICIARY		
3/12	HEARING		
3/14	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/16	2ND READING CONCURRED	83	3
3/18	3RD READING CONCURRED	96	0
	RETURNED TO SENATE WITH AMENDMENTS		
3/23	2ND READING AMENDMENTS CONCURRED	47	0
3/25	3RD READING AMENDMENTS CONCURRED	47	0

SB 8

SENATE FINAL STATUS

3/28 SIGNED BY PRESIDENT
 4/02 SIGNED BY SPEAKER
 4/02 TRANSMITTED TO GOVERNOR
 4/04 SIGNED BY GOVERNOR
 CHAPTER NUMBER 324

EFFECTIVE DATE: 10/01/91

SB 8 INTRODUCED BY MAZUREK
 REGULATE THE PRACTICE OF REAL ESTATE APPRAISING

12/27	INTRODUCED		
12/31	REFERRED TO BUSINESS & INDUSTRY		
1/07	FIRST READING		
1/30	HEARING		
1/30	FISCAL NOTE REQUESTED		
2/01	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/02	2ND READING PASSED	45	1
2/04	3RD READING PASSED	49	0
	TRANSMITTED TO HOUSE		
2/05	FISCAL NOTE RECEIVED		
2/05	FISCAL NOTE RECEIVED		
2/05	FIRST READING		
2/05	REFERRED TO BUSINESS & ECONOMIC DEVELOPMENT		
2/05	FISCAL NOTE PRINTED		
3/05	HEARING		
3/07	COMMITTEE REPORT—BILL CONCURRED		
3/09	2ND READING CONCURRED	79	13
3/22	TAKEN FROM 3RD READING AND PLACED ON 2ND READING		
3/23	2ND READING CONCURRED AS AMENDED	93	0
3/25	3RD READING CONCURRED	94	2
	RETURNED TO SENATE WITH AMENDMENTS		
3/26	2ND READING AMENDMENTS CONCURRED	49	0
3/27	3RD READING AMENDMENTS CONCURRED	49	0
4/04	SIGNED BY PRESIDENT		
4/04	SIGNED BY SPEAKER		
4/05	TRANSMITTED TO GOVERNOR		
4/09	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 409		

EFFECTIVE DATE: 4/09/91

SB 9 INTRODUCED BY DEVLIN
 LIMIT TO FIVE THE NUMBER OF BRANDS RECORDED OR
 RERECORDED BY ONE PERSON

12/27	INTRODUCED		
12/28	REFERRED TO AGRICULTURE, LIVESTOCK & IRRIG.		
1/07	FIRST READING		
1/09	HEARING		
1/10	COMMITTEE REPORT—BILL PASSED AS AMENDED		
1/11	2ND READING PASSED	50	0
1/12	3RD READING PASSED	49	0
	TRANSMITTED TO HOUSE		
1/14	FIRST READING		
1/14	REFERRED TO AGRICULTURE, LIVESTOCK & IRRIG.		
1/16	HEARING		
1/17	COMMITTEE REPORT—BILL CONCURRED		
1/19	2ND READING CONCUR MOTION FAILED	47	48
1/19	SEGREGATED FROM COMMITTEE OF WHOLE REPORT AND RETURNED TO 2ND READING		
1/23	2ND READING CONCURRED	86	12
1/24	3RD READING CONCURRED	82	15
	RETURNED TO SENATE		
1/28	SIGNED BY PRESIDENT		
1/29	SIGNED BY SPEAKER		
1/29	TRANSMITTED TO GOVERNOR		

SENATE BILL NO. 7

INTRODUCED BY MAZUREK

IN THE SENATE

DECEMBER 28, 1990 INTRODUCED AND REFERRED TO COMMITTEE
ON JUDICIARY.

JANUARY 7, 1991 FIRST READING.

FEBRUARY 23, 1991 COMMITTEE RECOMMEND BILL
DO PASS AS AMENDED. REPORT ADOPTED.

FEBRUARY 25, 1991 PRINTING REPORT.

 SECOND READING, DO PASS.

FEBRUARY 26, 1991 ENGROSSING REPORT.

 THIRD READING, PASSED.
AYES, 49; NOES, 0.

 TRANSMITTED TO HOUSE.

IN THE HOUSE

MARCH 4, 1991 INTRODUCED AND REFERRED TO COMMITTEE
ON JUDICIARY.

 FIRST READING.

MARCH 14, 1991 COMMITTEE RECOMMEND BILL BE
CONCURRED IN AS AMENDED. REPORT
ADOPTED.

MARCH 16, 1991 SECOND READING, CONCURRED IN.

MARCH 18, 1991 THIRD READING, CONCURRED IN.
AYES, 96; NOES, 0.

 RETURNED TO SENATE WITH AMENDMENTS.

IN THE SENATE

MARCH 23, 1991 RECEIVED FROM HOUSE.

 SECOND READING, AMENDMENTS
CONCURRED IN.

MARCH 25, 1991 THIRD READING, AMENDMENTS

CONCURRED IN.

SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

SENATE BILL NO. 7

INTRODUCED BY MAZUREK

A BILL FOR AN ACT ENTITLED: "AN ACT REPLACING THE UNIFORM FRAUDULENT CONVEYANCES ACT WITH THE UNIFORM FRAUDULENT TRANSFER ACT; EXTENDING FRAUDULENT CONVEYANCE LAWS TO PERSONAL PROPERTY TRANSFERS; DEFINING TRANSFERS CONSIDERED FRAUDULENT; PROVIDING REMEDIES AND DEFENSES; PROVIDING FOR LIMITATIONS OF CAUSES OF ACTION; AMENDING SECTION 53-5-401, MCA; AND REPEALING SECTIONS 31-2-301, 31-2-302, 31-2-303, 31-2-311, 31-2-312, 31-2-313, 31-2-314, 31-2-315, 31-2-316, 31-2-317, 31-2-321, 31-2-322, 31-2-323, 31-2-324, AND 31-2-325, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Short title. [Sections 1 through 11] may be cited as the "Uniform Fraudulent Transfer Act".

NEW SECTION. Section 2. Definitions. As used in [sections 1 through 11], the following definitions apply:

(1) "Affiliate" means:

(a) a person who directly or indirectly owns, controls, or holds with power to vote 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole discretionary power to vote the securities; or

(ii) solely to secure a debt if the person has not exercised the power to vote;

(b) a corporation 20% or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the debtor or a person who directly or indirectly owns, controls, or holds with power to vote 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole power to vote the securities; or

(ii) solely to secure a debt if the person has not exercised the power to vote;

(c) a person whose business is operated by the debtor under a lease or other agreement or a person substantially all of whose assets are controlled by the debtor; or

(d) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:

(a) property to the extent it is encumbered by a valid lien;

(b) property to the extent it is generally exempt under nonbankruptcy law; or

(c) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(a) if the debtor is an individual:

(i) a relative of the debtor or of a general partner of the debtor;

(ii) a partnership in which the debtor is a general partner;

(iii) a general partner in a partnership described in subsection (7)(a)(ii); or

(iv) a corporation of which the debtor is a director, officer, or person in control;

(b) if the debtor is a corporation:

(i) a director of the debtor;

(ii) an officer of the debtor;

(iii) a person in control of the debtor;

(iv) a partnership in which the debtor is a general partner;

(v) a general partner in a partnership described in subsection (7)(b)(iv); or

(vi) a relative of a general partner, director, officer, or person in control of the debtor;

(c) if the debtor is a partnership:

(i) a general partner in the debtor;

(ii) a relative of a general partner in, a general partner of, or a person in control of the debtor;

(iii) another partnership in which the debtor is a general partner;

(iv) a general partner in a partnership described in subsection (7)(c)(iii); or

(v) a person in control of the debtor;

(d) an affiliate or an insider of an affiliate as if the affiliate were the debtor; and

(e) a managing agent of the debtor.

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

1 (9) "Person" means an individual, partnership,
2 corporation, association, organization, government or
3 governmental subdivision or agency, business trust, estate,
4 trust, or any other legal or commercial entity.

5 (10) "Property" means anything that may be the subject
6 of ownership.

7 (11) "Relative" means:

8 (a) an individual related by consanguinity within the
9 third degree as determined by the common law;

10 (b) a spouse or an individual related to a spouse
11 within the third degree as so determined; or

12 (c) an individual in an adoptive relationship within
13 the third degree.

14 (12) "Transfer" means every mode, direct or indirect,
15 absolute or conditional, voluntary or involuntary, of
16 disposing of or parting with an asset or an interest in an
17 asset and includes payment of money, release, lease, and
18 creation of a lien or other encumbrance.

19 (13) "Valid lien" means a lien that is effective against
20 the holder of a judicial lien subsequently obtained by legal
21 or equitable process or proceedings.

22 NEW SECTION. Section 3. Insolvency. (1) A debtor is
23 insolvent if the sum of the debtor's debts is greater than
24 all of the debtor's assets at a fair valuation.

25 (2) A debtor who is generally not paying his debts as

1 they become due is presumed to be insolvent.

2 (3) A partnership is insolvent under subsection (1) if
3 the sum of the partnership's debts is greater than the
4 aggregate, at a fair valuation, of all of the partnership's
5 assets and the sum of the excess of the value of each
6 general partner's nonpartnership assets over the partner's
7 nonpartnership debts.

8 (4) Assets under this section do not include property
9 that has been transferred, concealed, or removed with intent
10 to hinder, delay, or defraud creditors or that has been
11 transferred in a manner making the transfer voidable under
12 [sections 1 through 11].

13 (5) Debts under this section do not include an
14 obligation to the extent it is secured by a valid lien on
15 property of the debtor not included as an asset.

16 NEW SECTION. Section 4. value. (1) Value is given for
17 a transfer or an obligation if, in exchange for the transfer
18 or obligation, property is transferred or an antecedent debt
19 is secured or satisfied, but value does not include an
20 unperformed promise made other than in the ordinary course
21 of the promisor's business to furnish support to the debtor
22 or another person.

23 (2) For the purposes of [section 5(1)(b) and 6], a
24 person gives a reasonably equivalent value if the person
25 acquires an interest of the debtor in an asset pursuant to a

regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

NEW SECTION. Section 5. Transfers fraudulent as to present and future creditors. (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

(2) In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether:

(a) the transfer or obligation was to an insider;

(b) the debtor retained possession or control of the property transferred after the transfer;

(c) the transfer or obligation was disclosed or concealed;

(d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(e) the transfer was of substantially all the debtor's assets;

(f) the debtor absconded;

(g) the debtor removed or concealed assets;

(h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(j) the transfer occurred shortly before or shortly after a substantial debt was incurred; or

(k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

NEW SECTION. Section 6. Transfers fraudulent as to present creditors. (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

NEW SECTION. Section 7. When transfer made or obligation incurred. For the purposes of [sections 1 through 11]:

(1) a transfer is made:

(a) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the

interest of the transferee; and

(b) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under [sections 1 through 11] that is superior to the interest of the transferee;

(2) if applicable law permits the transfer to be perfected as provided in subsection (1) and the transfer is not perfected before the commencement of an action for relief under [sections 1 through 11], the transfer is considered made immediately before the commencement of the action;

(3) if applicable law does not permit the transfer to be perfected as provided in subsection (1), the transfer is considered made when it becomes effective between the debtor and the transferee;

(4) a transfer is not made until the debtor has acquired rights in the asset transferred;

(5) an obligation is incurred:

(a) if oral, when it becomes effective between the parties; or

(b) if evidenced in writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

NEW SECTION. Section 8. Remedies of creditors. (1) In

an action for relief against a transfer or obligation under [sections 1 through 11], a creditor, subject to the limitations in [section 9], may obtain:

(a) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by Title 27, chapter 18; or

(c) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

NEW SECTION. Section 9. Defenses, liability, and protection of transferee. (1) A transfer or obligation is not voidable under [section 5(1)(a)] against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under [section 8(1)(a)], the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(a) the first transferee of the asset or the person for whose benefit the transfer was made; or

(b) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(3) If the judgment under subsection (2) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(4) Notwithstanding voidability of a transfer or an obligation under [sections 1 through 11], a good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(a) a lien on or a right to retain any interest in the asset transferred;

(b) enforcement of any obligation incurred; or

(c) a reduction in the amount of the liability on the judgment.

(5) A transfer is not voidable under [sections 5(1)(b) or 6] if the transfer results from:

(a) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(b) enforcement of a security interest in compliance with Title 30, chapter 9.

(6) A transfer is not voidable under [section 6(2)]:

(a) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made, unless the new value was secured by a valid lien;

(b) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(c) if made pursuant to a good faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

NEW SECTION. Section 10. Extinguishment of cause of action. A cause of action with respect to a fraudulent transfer or obligation under [sections 1 through 11] is extinguished unless action is brought under:

(1) [section 5(1)(a)] within 4 years after the transfer was made or the obligation was incurred or, if later, within 1 year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) [section 5(1)(b) or 6(1)] within 4 years after the transfer was made or the obligation was incurred; or

(3) [section 6(2)] within 1 year after the transfer was made or the obligation was incurred.

NEW SECTION. Section 11. Supplementary provisions.

Unless displaced by the provisions of [sections 1 through 11], the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

NEW SECTION. Section 12. Uniformity of application and construction. [Sections 1 through 12] must be applied and construed to effectuate the general purpose of making uniform the law with respect to the subject of [sections 1 through 12] among states enacting it.

Section 13. Section 53-5-401, MCA, is amended to read:

"53-5-401. Old-age assistance recovery. (1) Upon the death of any recipient of old-age assistance, the department of social and rehabilitation services shall execute and present a claim against the estate of ~~such the~~ person within the time specified in the published notice to creditors in the estate matter for the total amount of assistance paid under Chapter 82, Laws of 1937, as amended. ~~No A~~ claim ~~shall~~ may not be enforced against any real estate of a recipient

1 while it is occupied by the surviving spouse or dependent as
2 a home.

3 (2) Every transfer of property made by deed, grant,
4 bargain, sale, or gift by any recipient of old-age
5 assistance and recorded subsequent to his having received
6 such assistance ~~shall be~~ is presumed to have been made
7 without ~~fair---consideration value~~, as the term "~~fair~~
8 ~~consideration~~" "value" is defined by 31-2-303 [section 4],
9 and with the intent to defeat the purposes of this section.
10 These presumptions are disputable and may be controverted by
11 competent evidence.

12 (3) If the federal law so requires, the federal
13 government ~~shall be~~ is entitled to a share of any amounts
14 collected from recipients or their estates in proportion to
15 the amount ~~which~~ that it has contributed to the grants
16 recovered, and the amount due the United States ~~shall~~ must
17 be promptly paid by the state to the United States
18 government. The remaining portion of the amount collected
19 ~~shall~~ must be distributed to the state and county in
20 proportion to the total amount paid by each."

21 NEW SECTION. Section 14. Repealer. Sections 31-2-301,
22 31-2-302, 31-2-303, 31-2-311, 31-2-312, 31-2-313, 31-2-314,
23 31-2-315, 31-2-316, 31-2-317, 31-2-321, 31-2-322, 31-2-323,
24 31-2-324, and 31-2-325, MCA, are repealed.

25 NEW SECTION. Section 15. Codification instruction.

1 [Sections 1 through 12] are intended to be codified as an
2 integral part of Title 31, chapter 2, part 3, and the
3 provisions of Title 31, chapter 2, part 3, apply to
4 [sections 1 through 12].

-End-

Opponents' Testimony:

There were no opponents of SB 68.

Questions From Committee Members:

Chairman Pinsoneault asked how the drugs identified in the bill got on the list of controlled substances. Warren Amole replied these drugs are controlled by the Federal Department of Justice, and that the FDA makes recommendations of placement in schedules one through five, according to their potential for abuse or addiction.

Chairman Pinsoneault asked how often this is done. Mr. Amole replied it is done approximately every other legislative session.

Senator Towe asked how drugs would be deleted from the list. Mr. Amole replied they are deleted by the federal government when it is felt that they are no longer necessary to be in a schedule.

Senator Svrcek asked if any drugs are listed in the bill which have significance in a Native American religious ceremony or are being used by naturopaths. Mr. Amole replied that peyote is not listed, and said naturopaths have no authority to use controlled substances.

Closing by Sponsor:

Senator Kennedy made no closing remarks, except to ask the Committee to give the bill favorable consideration.

HEARING ON SENATE BILL 7Presentation and Opening Statement by Sponsor:

Senator Joe Mazurek, District 23, said SB 7 was introduced last session, but was not passed in order to look at the bill further. He commented that the bill did not receive much examination, but did receive some comment from Jon Doak, a Billings attorney (Exhibit #1).

Senator Mazurek stated the bill would adopt the Uniform Fraud Transfer Act, replacing the Uniform Fraud Conveyances Act. He told the Committee the bill is basically a modernization of the 1918 act, and that this format was adopted by the National Conference Committee on Uniform State Laws (NCCUSL) in 1984.

Senator Mazurek explained that the bill protects creditors against debtors who seek to conceal debt. He said uniformity is important where people cross state lines, and in relation to the bankruptcy act. Senator Mazurek added that this legislation has

been identified by the NCCUSL as a target act to be adopted by as many states as possible this year.

Senator Mazurek noted that terminology has changed since 1918, and with the new bankruptcy act in 1989. He said that as of 1989, 20 states had adopted this act, but was uncertain of the present count.

Senator Mazurek explained that section 2 contains definitions, section 3 defines insolvency, section 4 defines values; subsection 2 of section 4 addresses a court decision in a Texas case; section 6 cites two more cases, section 7 defines when transactions occur; section 8 defines remedies available to creditors; and section 9 protects good faith purchasers and subsequent good faith transferees. Senator Mazurek said section 10 changes the two-year statute of limitation on fraudulent transfers to four years. He added that the Committee may want to look at this, because the proposed four-year statute of limitations could be a problem.

Senator Mazurek said he believes there is a need for modernization, and commented that he is willing to make necessary changes and to work with the Committee on the bill. Senator Mazurek told the Committee he would try to get copies of changes made in other states, where adopted.

Proponents' Testimony:

There were no proponents of SB 7.

Opponents' Testimony:

There were no opponents of SB 7.

Questions From Committee Members:

Senator Crippen said he believed the definition of solvency and debt is quite broad. Senator Mazurek replied he is willing to work on these.

Senator Towe asked if language in lines 19-22, page 6, made exclusions from value. Senator Mazurek replied there is a formal publication of drafter intent and comments.

Senator Towe said he was concerned that the 4-year fraudulent conveyances statute would be different from the state fraud limit of 2 years. Senator Mazurek reminded Senator Towe that he addressed this issue in presenting the bill.

Senator Halligan asked what the existing remedy is for real property conveyances where mischief is involved. Senator Mazurek said he did not believe the bill affects that, adding that a pre-judgement writ of attachment can be obtained. He added that the bill is attempting to define what is fraudulent transfer, and said

the NCCUSL is not trying to change procedure, but to let states adopt their own philosophy.

Senator Mazurek advised the Committee he needed to come back to them after discussing the bill with Senator Crippen, Jon Doak, and others to find areas of agreement.

Closing by Sponsor:

Senator Mazurek made no closing comments.

EXECUTIVE ACTION ON SENATE BILL 31

Motion:

Discussion:

Chairman Pinsoneault asked Senator Towe if he had appropriate amendments to SB 31. He also suggested that the bill be held until SB 138 is heard on January 31, 1991.

Valencia Lane had provided committee members with copies of proposed amendments when the bill was heard (Exhibit #2), and Senator Towe again explained the amendments.

Senator Grosfield stated he was concerned with lowering standards. Senator Towe replied that if NIDA lowers threshold levels Montana will have to make independent determinations of threshold levels, except as related to hazardous employment where such employment is federally pre-empted.

Senator Grosfield said he believed the level for marijuana would be dropped to 50. He stated that according to information he had been given it was not possible to test positive at 100 nanograms by passive inhalation. Senator Grosfield continued, saying that at the 50 nanogram level, a positive test could result from being in a 5'x 5' x 8' cubicle where 16 marijuana cigarettes are smoked daily for five consecutive days.

Senator Grosfield asked if the Committee wanted different standards from federal levels as they are brought down. Senator Towe replied that he did not believe the proposed amendments speak to Senator Grosfield's concerns.

Valencia Lane stated that when the Legislature passes a law it incorporates references to other law changes, but in this instance, Montana would be running the risk of a challenge to the state law's constitutional authority. As an example, she cited the challenge made by Senator Gary Lee to the adoption of the 55 mph speed limit.

ROLL CALL

SENATE JUDICIARY

COMMITTEE

52nd LEGISLATIVE SESSION -- 1989

Date 22 Jan 91

NAME	PRESENT	ABSENT	EXCUSED
Sen. Pinsoneault	✓		
Sen. Yellowtail	✓		
Sen. Brown	✓		
Sen. Crippen	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Halligan	✓		
Sen. Harp	✓		
Sen. Mazurek	✓		
Sen. Rye	✓		
Sen. Svrcek	✓		
Sen. Towe	✓		

Each day attach to minutes.

R.F. HIBBS 1906-1985
HUGH SWEENEY
JON E. DOAK

DAVID J. DIETRICH

LAW OFFICES
SWEENEY & DOAK
2722 THIRD AVENUE NORTH
SUITE 300
P.O. BOX 2175
BILLINGS, MONTANA 59103

EXHIBIT 1
22 Jan 91
TELEPHONE 252-4101
AREA CODE 406

HORTON B. KOESSLER
OF COUNSEL

SB7

January 16, 1991

VIA TELEFAX

Senator Bruce D. Crippen
Capitol Station
P. O. Box 156
Helena, MT 59620

RE: Senate Bill No. 7: "An Act Replacing the Uniform
Fraudulent Conveyances Act, etc."

Dear Senator Crippen:

My legal practice primarily involves debtor/creditor, bankruptcy and collection matters. In my practice, I have regular contact with the Uniform Fraudulent Conveyances Act, and the exemption, voidable preference and fraudulent conveyance provisions of the Bankruptcy Code. In the foregoing context, I have reviewed Senate Bill No. 7 and believe it to be flawed in several respects.

I have three principal objections to the language of Senate Bill 7. First, I believe the definition of "debt" to be too broad and unworkable because the definition of "claim" broadly includes unliquidated, contingent and disputed obligations. Secondly, the definition of "insolvency" in Senate Bill 7 seems to me overbroad and unworkable insofar as it would include in "debts" all disputed and contingent obligations. The "insolvency" definition is also inconsistent with the definition of "insolvency" in Section 101(31) of the Bankruptcy Code. Thirdly, Section 4(2) of SB 7, regarding value, seems to insulate from examination any foreclosure sale or execution of a power of sale regardless of the relative disparity between the obligation owed and the value of the debtor's interest in the property foreclosed.

I also find the proposed statute vague in its definition of "property", its use of the term "substantially all" in Section 5(2)(e); use of the term "shortly after" in Section 5(2)(i); and use of "shortly before or shortly after" in Section 5(2)(j).

Under the proposed statute, "debt" means liability on a claim. A "claim" includes, however, a right to payment whether or not disputed. A purported debtor would not seem under current law to be liable on a claim disputed in good faith until the dispute is resolved. Under the proposed statutory scheme, even

Ex. 1

1-22-91

SB 7

"claims" asserted in bad faith or those subject to bona fide dispute are included in determining the solvency or insolvency of the purported debtor.

The broad "insolvency" definition would also in my view wreak havoc on legitimate commercial transactions. A party who was a guarantor of a fully secured corporate liability which is being and has been paid in its ordinary course by the corporation may nevertheless be deemed insolvent if the contingent liability on the guarantee, when added to the guarantor's other obligations, causes his liabilities to exceed his assets.

The "insolvency" definition under the Bankruptcy Code compares "debts" with the debtor's "property". The "insolvency" definition in Senate Bill 7 compares "debts", broadly defined, with the debtor's "assets," a term much more narrow than "property". Any significant guaranty obligations, suretyship, or other contingent liability, secured by a lien on the debtor's property, may render the debtor insolvent under the proposed definition, regardless of the fact that the obligation guaranteed is fully secured by property of the primary obligor.

Also of concern to me is the potentially unsettling effect the proposed law may have on legitimate transactions with those broadly defined as "insiders" for four or more years. Under the Bankruptcy Code, preferential transfers are voidable for 90 days as to third parties and one year as to insiders; while fraudulent conveyances are subject to a two year limitation under current law. Four years seems too long.

After comparing the proposed law with the existing Uniform Fraudulent Conveyances Act, I remain convinced the existing law fills the need for creditor protection adequately without introducing the vagueries and commercial uncertainty I see likely under the proposed law. I will be pleased to expand on the foregoing views if requested to do so.

Sincerely,

SWEENEY & DOAK

Jon E. Doak

JED:lca

2x. 1
1/22/91
SB 7

Why states should repeal Article 6 of the Uniform Commercial Code

Bulk sales laws were originally drafted in response to a fraud perceived to be common around the turn of the century: a merchant would acquire his stock in trade on credit, then sell his entire inventory ("in bulk") and abscond with the proceeds, leaving creditors unpaid.

Article 6 was drafted as a response to this "bulk sale risk." It imposes several duties on the buyer in bulk, including the duty to notify all creditors of the impending bulk transfer. It also requires compliance even when there is no reason to believe that the seller is conducting a fraudulent transfer. The Article imposes strict liability for noncompliance. Failure to comply with the provisions render the transfer ineffective, even when the buyer has complied in good faith.

But today, changes in the business and legal contexts in which sales are conducted have made regulation of bulk sales unnecessary. Creditors are better able to make informed decisions about whether to extend credit. Changes in technology have enabled credit reporting services to provide fast, accurate, and more complete credit histories at relatively small cost.

Creditors also have greater opportunity to collect their debts. The adoption of state long-arm statutes and rules have greatly improved the possibility of obtaining personal jurisdiction over a debtor who flees to another state.

And creditors no longer face the choice of extending unsecured credit or no credit at all. Retaining an interest in inventory to secure its price has become relatively simple and inexpensive under Article 9 of the UCC - adopted in 49 states. If a bulk sale is fraudulent and the buyer is a party to the fraud, creditors have remedies under the Uniform Fraudulent Transfer Act.

There is no evidence that in today's economy, fraudulent bulk sales are frequent enough, or engender credit losses significant enough, to require regulation of all bulk sales, including the vast majority that are conducted in good faith.

The Uniform Law Commissioners, therefore, encourage those states that have enacted Article 6 to repeal it.

Ex. 1

1/22/91

SB 7

Why states should revise Article 6 of the Uniform Commercial Code

Bulk sales laws were originally drafted in response to a fraud perceived to be common around the turn of the century: a merchant would acquire his stock in trade on credit, then sell the entire inventory ("in bulk") and abscond with the profits, leaving creditors unpaid.

Article 6 was drafted as a response to this "bulk sale risk." It affords creditors a remedy against a good faith purchaser for full value without notice of any wrongdoing on the part of the seller. In the legal context in which Article 6 was drafted, the benefits to creditors appeared to justify the costs of interfering with good faith transactions.

Present Article 6 imposes several duties on the buyer in bulk. These duties include the duty to notify the creditors of the impending bulk transfer. This can be burdensome, particularly when the seller has a large number of creditors.

The Article requires compliance even when there is no reason to believe that the seller is conducting a fraudulent transfer, as when the seller is scaling down the business but remaining available to creditors. And it also imposes strict liability for noncompliance. Failure to comply with the provisions of the Article renders the transfer ineffective, even when the buyer has complied in good faith, and even when no creditor has been injured by the noncompliance.

The current revision of Article 6 is designed to reduce the burdens and risks imposed upon good-faith buyers of business assets while increasing the protection afforded to creditors.

Among the needed changes are:

- Article 6 applies only when the buyer has notice that the seller will not continue to operate the same or a similar kind of business after the sale;
- when the seller is indebted to a large number of creditors, the buyer does not have to send individual notice to every person, but instead may give notice by filing;
- a buyer who makes a good faith effort to comply with the requirements of Article 6 is not liable for noncompliance.

Present Article 6 has become inadequate to regulate modern bulk sales. The revised Article is designed to afford better protection to creditors while minimizing the impediments to good-faith transactions.

the Hill and Judith Basin County Coroners assisted with the amendments.

Senator Svrcek made a motion to approve the proposed amendments.

Senator Grosfield commented that the jury should be able to go to the scene of a crime (amendment 11, page 5 of the bill). Valencia Lane replied that this language was suggested by the Coroners, and said the problem is that juries are serving many months after an incident has taken place.

The motion made by Senator Svrcek carried unanimously.

Recommendation and Vote:

Senator Harp made a motion that SB 331 DO PASS AS AMENDED.

Senator Crippen said it looks like the bill is reinserting old language previously removed from the law (page 8, line 19), concerning preserving evidence for an unlimited amount of time. Valencia Lane replied she didn't know. Senator Mazurek looked up the repealer in the Code and said it was okay.

The motion made by Senator Harp carried with all members voting aye except Senators Mazurek, Crippen, and Harp who voted no.

EXECUTIVE ACTION ON SENATE BILL 7

Motion:

Discussion:

Amendments, Discussion, and Votes:

Senator Mazurek provided proposed amendments (Exhibit #7). He said the amendments define what a claim is and what insolvency is, and that page 5, line 24 describes assets as including everything one can have an interest in.

Senator Crippen gave an example of a partnership experiencing a downturn whose assets dip below the debt of the partnership. He said that is not insolvency, but according to the bill it is. He asked if it would then be fraudulent for the partnership were to then make a transfer of property. Senator Mazurek replied it would not be fraudulent unless the transfer were made to avoid a legitimate obligation. He added that as long as the transfer was made for fair value there would be no problem.

Senator Crippen asked what would happen if a financial institution referred to the part of the bill concerning insolvency. He said he realizes it deals with fraudulent conveyances, but feels there is danger that banks could make such referral. Senator

Crippen added that he believes the bill is needed, and said he is willing to go along with it if it is worked on in the House.

Senator Mazurek commented that striking subsection (2) which says that as long as a mortgage is foreclosed and a sale held it is not collusive, would then protect a debtor. He said most states have adopted what is in subsection (2). Senator Mazurek advised that Committee that one other change shortens the statute of limitations on page 14, line 1.

Senator Mazurek made a motion to approve the proposed amendments. The motion carried unanimously.

Senator Crippen made a motion to strike subsection (3) in its entirety; to strike "(1)" and insert "and" on page 5, line 24; and to strike "A" on lines 22 and 25 on page 1 and insert "The". The motion carried unanimously.

Recommendation and Vote:

Senator Mazurek made a motion that SB 7 DO PASS AS AMENDED. The motion carried unanimously.

EXECUTIVE ACTION ON SENATE BILL 53

Motion:

Senator Grosfield made a motion to remove SB 53 from TABLE. The motion carried unanimously.

Discussion:

Amendments, Discussion, and Votes:

Valencia Lane provided copies of proposed amendments she and Lois Menzies, Gambling Division, prepared (Exhibit #8).

Bob Robinson, Gambling Division Administrator, explained the amendments (gray bill attached to Exhibit #8).

Senator Halligan commented that shaking for lunch is not covered. Senator Brown replied that goes on all the time and no one cares about it or gets into trouble for doing it.

Senator Yellowtail reminded the Committee that he had made a motion to delete subsection (b) on January 23, 1991, and said he would resist shaking for a pot.

Senator Yellowtail made a motion to approve 2, 3, 4, 8, 9, and 10 of the Menzies/Lane amendments, and to strike ". The" and insert

ROLL CALL

SENATE JUDICIARY

COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date 23 Feb 91

NAME	PRESENT	ABSENT	EXCUSED
Sen. Pinsoneault	✓		
Sen. Yellowtail	✓		
Sen. Brown	✓		
Sen. Crippen	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Halligan	✓		
Sen. Harp	✓		
Sen. Mazurek	✓		
Sen. Rye	✓		
Sen. Svrcek	✓		
Sen. Towe	✓		

Each day attach to minutes.

SENATE STANDING COMMITTEE REPORT

Page 1 of 1
February 23, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration Senate Bill No. 7 (first reading copy -- white), respectfully report that Senate Bill No. 7 be amended and as so amended do pass:

1. Page 3, line 8.

Following: "unmatured,"

Strike: "disputed, undisputed,"

2. Page 5, line 24.

Following: "debtor's"

Strike: "assets"

Insert: "property"

Following: "valuation"

Strike: "."

Insert: "and"

3. Page 5, line 25.

Strike: "(2) A"

Insert: "the"

Following: "debtor"

Strike: "who"

4. Page 6, lines 1 through 7.

Following: "due" on line 1

Strike: remainder of line 1 through "debts" on line 7

Re-number: subsequent subsections

5. Page 6, line 23 through page 7, line 4.

Strike: subsection (2) in its entirety

Re-number: subsequent subsection

6. Page 13, line 22.

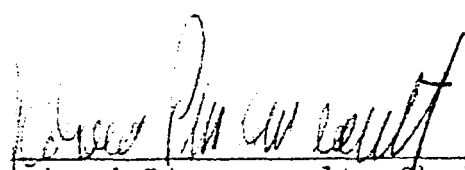
Strike: "4"

Insert: "2"

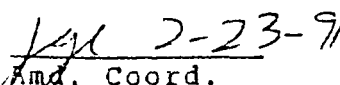
7. Page 14, line 1.

Strike: "4"

Insert: "2"

Signed: 

Richard Pinsoneault, Chairman

 2-23-91
Amd. Coord.

 11:15
Sec. of Senate

421304SC.Sji

Exhibit #7
23 Feb 91
SB 7

Amendments to Senate Bill No. 7
First Reading Copy

Requested by Senator Mazurek
For the Committee on Judiciary

Prepared by Greg Petesch
February 20, 1991

1. Page 3, line 8.
Following: "unmatured,"
Strike: "disputed, undisputed,"

2. Page 5, line 24.
Following: "debtor's"
Strike: "assets"
Insert: "property"
Following: "valuation"
Strike: "."
Insert: "and"

3. Page 5, line 25.
Strike: "(2) A"
Insert: "the"
Following: "debtor"
Strike: "who"

4. Page 6, lines 1 through 7.
Following: "due" on line 1
Strike: remainder of line 1 through "debts" on line 7
Renumber: subsequent subsections

5. Page 6, line 23 through page 7, line 4.
Strike: subsection (2) in its entirety
Renumber: subsequent subsection

6. Page 13, line 22.
Strike: "4"
Insert: "2"

7. Page 14, line 1.
Strike: "4"
Insert: "2"

Exhibit 7a
SB 7

2/23/91

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

Suite 1700
676 N. St. Clair
Chicago, IL 60611
(312) 915-0195
FAX# (312) 915-0187

FAX from: JOHN M. McCABE, LEGISLATIVE DIRECTOR

FAX to: SEN. JOSEPH P. MAZUREK

Cover Sheet + 5 page(s).

National Conference of Commissioners on Uniform State Laws

676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611-(312) 915-0195

January 25, 1991

John M. McCabe
Legislative DirectorSen. Joseph P. Mazurek
P.O. Box 1715
301 First Bank Bldg.
Helena, Mt 59624

RE: Uniform Fraudulent Transfer Act (UFTA)

Dear Joe:

I have looked at Mr. Doak's letter, and, indeed, have a response. Copies of his letter and my response are also going to Frank Kennedy, who was the Reporter for the Fraudulent Transfer Act. It may be that he will comment further.

The Uniform Fraudulent Transfer Act (UFTA) replaced the 1918 Uniform Fraudulent Conveyance Act (UFCA) in 1984. Montana appears to have adopted the UFCA in 1945. Why did the ULC decide to amend the 1918 act? The universe of creditors and debtors had changed enormously, along with the economy of the United States. The language and breadth of the old act simply was not adequate for the needs of a more complex economy with enormously complex creditor-debtor relationships. In addition, Congress began a major revision of the bankruptcy laws of the United States (to which Professor Kennedy made a very large contribution) in the mid-1980's and it was simply no longer feasible to continue with the old act.

I apologize for the somewhat general introduction in the last paragraph, but I think it begins to address the real complaint that underlies Mr. Doak's specific criticisms of the UFTA. When I see words like "too broad" and "vague," sprinkled throughout criticism of an act, I tend to think that there are broader policy objections that are the real source of complaint. There is no question that the UFTA reaches a somewhat broader spectrum of creditor-debtor relationships than the UFCA does, although it would be wrong to characterize the UFTA as a radical departure from the UFCA. But then that spectrum has become more complex and ever larger over the time between the old act and the

new act. And it is this broader reach, in general, that bothers Mr. Doaks, I suspect.

Both the UECA and the UFTA have a common objective in mind. The intent in both is to establish a level playing field for unsecured creditors in their relationship to any given debtor and in their ability to satisfy claims by gaining access to the assets of the debtor, when and if the debtor defaults. A debtor is not entitled to transfer assets for the specific purpose of defeating the claims of creditors or to make preferential transfers to some creditors that defeat the claims of other creditors. We have to look at the criticisms of Mr. Doak in light of these objectives.

Mr. Doaks indicates that the UFTA definitions of "debt" and "claim" are too broad because, together, they encompass "unliquidated, contingent and disputed obligations." To begin with, these definitions mimic the Bankruptcy Code. The UFTA definition of debt is nearly word for word the definition used in the Bankruptcy Code. In both, the word "claim" is defined to include "unliquidated, contingent and disputed obligations." But even more interesting is the fact that these definitions do not establish a radical change in the existing law. The UECA defines "debt" to include "any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." Montana law has had a broad definition of "debt" since 1845.

The law has had such broad definitions simply because there are a lot of ways to create the creditor-debtor relationship, and unless the definitions are broad that level playing field I discussed above will not be so level. Some relationships will be excluded in reckoning the rights of all legitimate creditors.

Mr Doak indicates that the definition of "insolvency" in the UFTA is inconsistent with the definition in the Bankruptcy Code. That may or may not be a real problem, depending upon the relationship between the Bankruptcy Code and the UFTA. There is no inherent reason for absolute correspondence between the terms of the two, but the fact is that the UFTA definition is derived from the Bankruptcy Code definition, and there is enormous correspondence between them. Both provide a measure of value of owned property against debts. The fundamental principles are identical.

The major difference in the basic measure is that the Bankruptcy Code relies upon "property" in the broader form, and the UFTA relies upon the word "assets", which is all property

excluding encumbered property, exempt property, and property in tenancy by the entirety (not an issue in Montana, I believe.).

In this respect, the UFTA is closer to the UFCA definition than it is to the Bankruptcy Code. The UFCA (current Montana law) uses the term "assets" in its provision on insolvency. The UFCA definition is not much different from the UFTA definition, and, in fact, the UFTA does not make a very significant change in current law with respect to defining insolvency. At best, it could be defined as being only slightly broader than its predecessor.

What is the significance of using the term "assets" as defined in the UFTA? It means a more precise and fairer measure of actual insolvency. To the unsecured creditor, the debtor is insolvent if he or she is not paying obligations and if there is not property to meet them. Only unencumbered and non-exempt property is really available to meet obligations. Only that kind of property should be used to determine the issue of insolvency. Both the UFCA and the UFTA have a better view of this issue than the Bankruptcy Code does.

Mr. Doaks continues on the issue of the definition of insolvency by alleging impairment of various kinds of contingent obligations. It is quite clear that some contingent obligations will be fraudulent transfers. For example, if a corporation guarantees some of the debts of a corporate officer and takes a broad security interest in the property of the officer to secure the guarantee, that very well may be a fraudulent transfer. Creation of such an interest may very well be a ploy to defeat the officer's creditors or to establish a favorable preference for favored creditors, and if it makes the debtor insolvent - should probably be thought of as a fraudulent transfer.

We probably ought always to be skeptical about any transaction that makes a debtor technically insolvent, if not actually insolvent. The key concept is "reasonably equivalent value." In legitimate business deals, the notion of reasonably equivalent value is generally a given. But even if there is not a reasonably equivalent value given, and there is a technical insolvency, before there is a fraudulent transfer, there must be more, intent, entry into ventures that are on their face particularly risky, or existing creditor-debtor relationships that would be undone by the mere fact of insolvency. What I suggest is that legitimate business is not hampered by the UFTA. It is instructive to look at Section 8 for the protections that it affords legitimate transferees and obligees.

Any contingent obligation of the kind cited in Mr. Doak's letter is mainly in a position to have its priorities re-ordered, but not to lose any position it ought to have as a legitimate deal. By Section 7(a)(1), it is avoided only to the extent necessary to satisfy the aggrieved creditor's claims. By Section 8(d), lien and enforcement rights are obtained for any good faith obligation. The claim that the UFTA burdens legitimate commercial transactions is just not credible.

Mr. Doaks makes objection to Section 3(b). There is no provision in the UFTA that has achieved wider acclaim than this one. It responds directly to the problem raised by Durrett v. Washington Nat. Ins. Co., 621 Fed.2d 201 (5th Cir. 1980). In that case, the court voided a foreclosure sale in Texas, and threw real estate financing in the United States into a tizzy. Durrett, which is a bankruptcy case, remains a serious cloud on real estate foreclosures everywhere. We did not want to make the same mistake in the UFTA. There is enormous commentary on the Durrett case in the legal literature, and all critical of that case. The popularity of the UFTA is to a great degree dependent upon its prohibition of a Durrett kind of decision in state law.

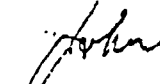
The last thing that Mr. Doak addresses is the four year statute of limitations on insider transfers under Section 5. Realistically, the Bankruptcy Code limitations are fatally short. Insider transactions can take place subtly and without notice to those outside the entity within which the transactions take place. It is unconscionable to expect action within 90 days or even within one year. Four years may be a short time in light of the transfers with which the act deals. Certainly, four years must be considered a minimum for adequate protection of existing creditor's interests.

So far, the UFTA has been adopted in 26 states. There is no indication that legitimate business has been impeded in any of them. The rising tide of insolvencies has made the adoption of a modern fraudulent transfer statute even more necessary, and I anticipate that it will be adopted in a substantial number of jurisdictions in 1991 and 1992. In addition, the repeal of UCC Article 6 is really not fully effective unless the UFTA is put in place. There is a strong argument that the real protection that unsecured creditors need is in the UFTA, not in bulk sales statutes. Having the UFTA makes it much easier to repeal UCC Article 6. The Connecticut Law Revision Commission, for example, has made such a recommendation to the Connecticut Legislature. I expect that these issues will become more and more coupled together as time goes on.

5

I hope that these remarks will be of some assistance to you.
Thanks for your kind attention.

Sincerely,



John M. McCabe
Legislative Director

cc & enc: Frank Kennedy

Proponents' Testimony:

Bob Pyfer, Vice President - Montana Credit Unions League, stated that he attests to the process that includes the Montana Uniform State Commission of Law goes through and the expertise and talent they have at their disposal is very awesome. He stated that SB 1 would have impact on credit unions and his national association has a UCC committee that did have input into the bill and feels that the bill takes a balanced approach that modernizes the law by filling in some gaps. He urged the committee to give SB 1 a favorable consideration.

Opponents' Testimony: NONEQuestions From Committee Members:

REP. TOOLE asked SEN. MAZUREK if there is anything going on, nationally, that would suggest that any of these proposals have not been successfully adopted? SEN. MAZUREK stated, "no," but if he was asked that four years ago regarding leases, he would have said yes. He said that leases had gone back to the drawing board and now is widely accepted and working in many states. Now there is a major push to adopt the article dealing with leases.

REP. BROOKE asked SEN. MAZUREK asked if the Federal Government has control of regulation these codes? SEN. MAZUREK stated that the consumer transfers to credit cards machines are not governed by article 4a but by Federal Law. He stated that he hoped states would look at bank charges as opposed to the Federal Government doing it. He felt that it one of the arguments for the code to be modernized.

Closing by Sponsor:

SEN. MAZUREK urged the committee to give SB 1 a do pass consideration.

HEARING ON SB 7
UNIFORM FRAUDULENT TRANSFERS ACT

Presentation and Opening Statement by Sponsor:

SEN. MAZUREK, SENATE DISTRICT 22, stated that SB 7 would replace the Uniform Fraudulent Advances Act with the Uniform Fraudulent Transfers Act. He passed the committee an explanation of the Uniform Fraudulent Transfers Act and some arguments as to why it should be adopted. EXHIBIT 4. He stated that the theme of the act is that citizens of society are only as good as their word as to the extent in which they honor their obligations. Obligations which are incurred should not be avoided by manipulation. He stated that the bill recognizes how important creditors are to society and attempts to assure availability by providing protection to creditors against debtors who seek to avoid their

debts by the transfer of property. The main reason the bill comes to the committee is modernization of the old Fraudulent Transfer Act in the state and it arises because the changes of the old bankruptcy act necessitate for the revisiting of how this was dealt with in the past.

Proponents' Testimony: NONE

Opponents' Testimony: NONE

Questions From Committee Members:

REP. BOHARSKI asked SEN. MAZUREK if he felt that the bill now makes it a little more difficult to file bankruptcy? SEN. MAZUREK stated that the bill will not effect someone's ability to file bankruptcy because that is determined by Federal Law. The changes relate to the definition of when someone is insolvent. When someone is insolvent and transfers property then there is a presumption created that the transfer was fraudulent. This bill narrowly defines the term insolvency to tighten up the definition.

Closing by Sponsor: NONE

EXECUTIVE ACTION ON SB 214

Motion/Vote: REP. GOULD MOVED SB 214 BE CONCURRED IN. Motion carried unanimously.

EXECUTIVE ACTION ON SB 228

Motion: REP. GOULD MOVED SB 228 BE CONCURRED IN.

Discussion:

REP. DARKO stated that she was asked by Sen. Svrcek to move the amendments he had prepared by Greg Petesch. EXHIBIT 5

Motion: REP. DARKO moved to amend SB 228 with proposed amendments by Sen. Svrcek.

Discussion:

REP. BROWN stated that a lawyer doing a reasonable business in Montana is not going to take the jump to be a judge because of the low salary. He felt that the Senate kept the salary down to

HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

ROLL CALL

DATE 3.12-91

NAME	PRESENT	ABSENT	EXCUSED
REP. VIVIAN BROOKE, VICE-CHAIR	/		
REP. ARLENE BECKER	/		
REP. WILLIAM BOHARSKI	/		
REP. DAVE BROWN	/		
REP. ROBERT CLARK	/		
REP. PAULA DARKO	/		
REP. BUDD GOULD	/		
REP. ROYAL JOHNSON	/		
REP. VERNON KELLER	/		
REP. THOMAS LEE	/		
REP. BRUCE MEASURE	/		
REP. CHARLOTTE MESSMORE	/		
REP. LINDA NELSON	/		
REP. JIM RICE	/		
REP. ANGELA RUSSELL	/		
REP. JESSICA STICKNEY	/		
REP. HOWARD TOOLE	/		
REP. TIM WHALEN	/		
REP. DIANA WYATT	WYATT		
REP. BILL STRIZICH, CHAIRMAN	/		

DURRETT, THE UNIFORM FRAUDULENT TRANSFER ACT, AND
FEDERAL BANKRUPTCY LAW - SORTING OUT CONFUSION

There has been much confusion over the relationship of mortgage foreclosures, however done, and fraudulent conveyance statutes, including the 1984 Uniform Fraudulent Transfer Act (UFTA). The confusion results from a single, now notorious case, Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980). The Court, in Durrett, held a noncollusive mortgage foreclosure conducted pursuant to Texas law a constructively fraudulent transfer under Section 67d of the Bankruptcy Act. The Bankruptcy Act has fraudulent transfer provisions directly analogous to the UFTA.

Durrett has not been followed in all circuits of the federal courts. It has been directly rejected in the Sixth and Ninth Circuits, for example. Its influence on state law in the interpretation of the 1918 Uniform Fraudulent Conveyance Act (UFCA) and those states still following the common law is not yet clear. Much speculation attends the possibilities in that regard, however.

Why is Durrett so important? Its holding calls the validity of the bulk of mortgage foreclosure sales into question. Almost never do such sales realize the current market price for real estate bought and sold in the ordinary course. A key element in fraudulent conveyance analysis is the concept of "fair consideration" or "reasonably equivalent value." In Durrett, the foreclosure sale realized less than 70% of the alleged market value, and was a fraudulent transfer for that fact.

As a result of Durrett, buyers in foreclosure sales lose assurance of title. Lenders cannot be sure of lending practices. The uncertainty that Durrett forecasts has large economic impact in real estate markets.

UFTA attempts to alleviate the difficulties that Durrett suggests. In Section 3(b), value is "reasonably equivalent value" if given in "a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement." Adoption of this provision would preclude a Durrett type of holding in any state adopting UFTA. Only private, non-public types of transfers, such as some kinds of deed in lieu of foreclosure, would be vulnerable. But these are exactly the kinds of transfers UFTA is designed to remedy anyway. UFTA Section 3(b) removes the uncertainty that Durrett has created, insofar as state law is concerned.

We must be clear, however, on the distinction between federal and state law, the Bankruptcy Act and state fraudulent conveyance law. Durrett still applies in federal bankruptcy law,

even when the UFTA applies in state actions. Indeed, in the 1984 amendments to the Bankruptcy Act, the holding in Durrett was reinforced. Durrett continues to be a problem in bankruptcy proceedings.

Why eliminate Durrett-type holdings? Durrett reflects dissatisfactions with the state of foreclosure procedures and perceived inequities that result from them. And that may be a legitimate concern. Using notions of fraudulent transfer to redress those inequities, however, is an oblique approach at best and a meat axe at the worst.

UFTA, its predecessor UFCA, and all fraudulent conveyance law preceding them primarily protect unsecured creditors (those for which no property acts as collateral) from certain actions of debtors that most everybody can agree are actually or constructively fraudulent. Durrett tends to turn that notion on its head. It would turn the remedy against secured creditors who are using accepted, legal procedures to recover loss after a default. This is not a role that fraudulent transfer law was ever designed to fill.

Not only does Durrett turn the remedy against an inappropriate defendant, it clouds every subsequent sale until the statute of limitations runs on any possible fraudulent transfer action. Every title examination after a foreclosure must inevitably result in exceptions for fraudulent transfer actions, leaving subsequent purchasers exposed. These are costs that are borne by sellers and buyers who are not involved in the foreclosure. If there are inequities in foreclosure actions, attacking them with fraudulent transfer theories merely spreads their burden to others. Nothing is really done to remedy them. UFTA Section 3(b) is an appropriate, timely response to the problem.

THE UNIFORM FRAUDULENT TRANSFER ACT

by

FRED H. MILLER
Professor of Law at the University of Oklahoma

Section by Section Analysis of the Act

Section ²~~1~~ contains definitions. ³~~4~~ Section ³~~2~~ also contains the definition of "insolvent," and Section ³~~3~~ the definition of "value." The definition of "asset" in Section ³~~2~~(2), together with the latter definitions of "insolvent" and "value," in a general sense formulate the core concept of the act: the transfer of an asset (or incurring an obligation) for inadequate value by an insolvent debtor or one rendered insolvent by the transaction is a fraudulent transfer. Subsection ³~~4~~(2) is worth particular note in this respect because it overrules for state law the controversial holding in Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980), that a regularly conducted mortgage foreclosure that produces a price "too low" may be avoided as a fraudulent conveyance. By clouding property titles the Durrett rule virtually is a self-fulfilling prophecy.

Section ⁵~~3~~ Subsection ⁵~~a~~(a) states the basic rule of the act: a transfer made or an obligation incurred with actual intent to hinder, delay or defraud creditors is actionable by creditors. How does a creditor prove the debtor's actual intent? Subsection ⁵~~b~~ sets out "badges of fraud" if several of these appear it is strong evidence. Subsection ⁵~~3~~(b), on the other hand, sets out two cases where the law decrees the intent exists if the facts are as stated.

Section ⁶~~3~~ states two further cases where the law decrees the transaction is fraudulent, but only as to present creditors and not also as to creditors arising later as is the case for transfers covered by Section 5.

Section ⁷~~1~~ defines when a transaction occurs. It occurs when it can prejudice the rights of third parties, and not when it actually occurs between the parties to it. For example, a creditor does not need this act to set aside a fraudulent security interest that is never filed; the creditor can defeat that interest under the Uniform Commercial Code. Subsection 5 of this Section also states the time when an obligation is incurred.

⁸
Section ~~7~~ describes the remedies a creditor has to attack and avoid a fraudulent transfer or obligation.

⁹
Section ~~8~~, however, protects a good faith purchaser for reasonably equivalent value who did not share in the debtor's fraudulent purpose and subsequent good faith transferees for value who are sufficiently remote. Subsection (4) also gives a good faith transferee or obligee against whom the transaction can be avoided protection for any value given.

Subsection (5) is important as protecting lease terminations and security interest enforcement against "Durrett type" attacks, and Subsection (6) allows "workouts" and the like to occur.

¹⁰
Section ~~8~~ prescribes statutes of limitation specifically for the act.

¹¹
Section ~~10~~ states the act is supplemented by other law and Section ~~11~~ ¹² specifies that in interpreting the act, precedent from other states that have enacted it should be used to maintain uniformity.

¹³
Section ~~12~~ provides the title.

¹⁴
Section ~~13~~ repeals the current statutes on the subject, including any old predecessor versions of this act.

UNIFORM FRAUDULENT TRANSFER ACT

When we say a person "owns" something, we tend to think in all or nothing terms. Whatever a person owns is at that person's disposal - to sell, to give, to abandon, or to pledge as security for a debt. But relationships between people over property are never so simple or so unqualified. A creditor-debtor relationship, for example, may materially change an owner's power over the property owned. A mortgage, clearly, restricts what an owner may do with mortgaged real estate. The creditor has legally protected rights in the real estate securing the debt. Under Article 9 of the Uniform Commercial Code, secured creditors, also, obtain rights in collateral that are protected.

A less clear category, but important to the maintenance of credit, is that of the unsecured creditor-debtor relationship in which the debtor manipulates property to defeat the creditor's interest solely for that purpose and for no other. Perhaps the debtor foresees insolvency and tries to conceal property that a creditor might use to satisfy the debt. Perhaps the debtor never intends to satisfy the debt and manipulates property to make himself judgment-proof. Should the creditor be without recourse, and should the debtor's rights to deal with property be unrestricted in these kinds of cases?

The National Conference of Commissioners on Uniform State Laws (ULC) proposed the Uniform Fraudulent Conveyance Act (UFCA) in 1918 as an answer to that question. It was created to supersede the Statute of 13 Elizabeth which was enacted in some form by many states, and which introduced the concept of the fraudulent conveyance into the law of every American jurisdiction, with or without enactment. The UFCA was adopted in twenty-six states, and its provisions were incorporated into the Federal Bankruptcy Act.

In 1984, this 1918 Act was revised and renamed the Uniform Fraudulent Transfer Act (UFTA). The intent of the UFTA is the same as the UFCA - it classifies a category of transfers as fraudulent to creditors and provides creditors with a remedy for such transfers. The fundamental remedy is the recovery of the property for the creditor. (Why a new Act at this time? (1) The terminology of the UFCA had become considerably archaic, and needed to be modernized. (2) The Bankruptcy Reform Act of 1978 changed the federal law on fraudulent transfers in significant ways, and made it imperative to reconsider state law. (3) And creditor-debtor relationships have changed and become more complicated, so that the whole issue of fraudulent transfers needed rethinking. In 1984, the UFTA is ready to promote the modernization of this subject area of law.

UFTA creates a right of action for any creditor against any debtor and any other person who has received property from the debtor in a fraudulent transfer. A fraudulent transfer occurs when a debtor intends to hinder, delay, or defraud a creditor, or transfers property under certain conditions to another person without receiving reasonably equivalent value in return. But not all such transfers are fraudulent to every creditor.

Fraud. Xfers

UFTA distinguishes between present and future creditors, and specifies the kinds of transfers that are fraudulent to each of the two categories of creditors. Both present and future creditors may recover property when there is a transfer with intent to defraud. Both may recover when a transfer is made without receiving reasonably equivalent value when the result is to make the debtor's assets unreasonably small in relation to the business or transaction in which the debtor is engaged or about to be engaged. Also, present and future creditors can both recover when a debtor transfers property without receiving reasonably equivalent value when intending to incur debts beyond the ability to pay.

Present creditors, however, can recover property when it is transferred by a debtor to another person without receiving reasonably equivalent value if the debtor is insolvent or becomes insolvent as a result of the transfer. A transfer to an "insider" without receiving reasonably equivalent value when the debtor is insolvent, is also fraudulent to present creditors. The term "insider" is defined, and is someone with a special relationship to the debtor. Examples are relatives or business partners (when the debtor is a partner). To be liable, an "insider" must have reasonable cause to believe that the debtor is insolvent.

Remedies

The fundamental relief for a creditor when there is a fraudulent transfer is recovery of the property from the person to whom it has been transferred. UFTA allows "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim...." Whatever is necessary to obtain the property is provided for, including attachment, injunctive relief, appointment of a receiver, or "any other relief the circumstances may require." If the creditor has reduced the claim to a judgment, the court may levy execution against the recovered assets. This means that the property can be sold to satisfy the amount of the judgment.

Differences
New
4CT

Much of the UFTA resembles the UFCA, its predecessor. What, then, are some of the differences? (A more detailed comparison is available from the ULC.) To begin with, the term "transfer" taken from the Federal Bankruptcy Act replaces the term "conveyance." ② UFCA uses the term "fair consideration" instead of "reasonably equivalent value." "Reasonably equivalent value" does not include the element of good faith as "fair consideration" does, and is more sharply defined than "fair consideration" is in the UFCA. ③ UFTA overcomes the problem raised in the case of

Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), a case that jeopardized mortgage foreclosure sales. Under UFTA, a properly conducted foreclosure sale is not a fraudulent transfer, notwithstanding the fact that it does not recover an amount somewhat near the actual market value of the property. (3) The concept of the "insider" is new in the UFTA. (6) UFTA provides for defenses of transferees and for a statute of limitations. Both issues are not addressed in the UFCA.

The Uniform Fraudulent Transfer Act continues the concept of a civil action for transfers fraudulent to creditors first created in the Statute of 13 Elizabeth, and comprehensively continued in the Uniform Fraudulent Conveyance Act. The new Act takes into account the considerable development in both law and practice in creditor-debtor relationships since 1918. The ULC hopes that it will be adopted uniformly in all states.

A SHORT COMPARISON OF THE UNIFORM FRAUDULENT TRANSFER ACT
WITH THE UNIFORM FRAUDULENT CONVEYANCE ACT

The Uniform Fraudulent Transfer Act (UFTA) is a modernization of the Uniform Fraudulent Conveyance Act (UFCA) that was originally promulgated by the Uniform Law Commissioners in 1918. Since the rights and remedies between the earlier and later Acts are much the same, what are the differences, and what advantages accrue from adopting the UFTA over the UFCA? A short summary of the substantive differences follows¹:

1. There are a number of more precisely defined terms in UFTA in Section 1 than are found in Section 1 of the UFCA. These new definitions include the words "affiliate," "claims," "debtor," "insider," "lien," "person," "property," "relative," "transfer," and "valid lien." The newly defined terms result in greater clarity throughout the UFTA and facilitate new provisions that will be discussed a little further on. Of the definitions, the one giving the UFTA its new title is "transfer." "Transfer" replaces the word "conveyance" as found in Section 1 of the UFCA. Both are comprehensive terms, but "transfer" comes from Section 101(48) of the Bankruptcy Code and is the more accepted modern term.

2. Both UFTA and UFCA define "insolvency" in Section 2, but UFTA establishes a rebuttable presumption of insolvency in Section 2(b) when a debtor is not generally paying his or her debts as they become due. Section 2(d) of UFTA prevents any fraudulently transferred property from being included in the debtor's assets when determining whether the debtor is insolvent or not. Section 2(e) of the UFTA prevents any obligation secured by a valid lien on the debtor's property, that is not an asset under Section 4, from being included as a debt for the purposes of determining insolvency. UFCA has no provisions similar to UFTA Sections 2(b), (d) or (e).

3. UFTA Section 3 replaces the term "reasonably equivalent value" for the term "fair consideration" as found in UFCA Section 3. "Reasonably equivalent value" is somewhat different from "fair consideration." "Good faith," which is an element in "fair consideration," is not an element in "value." "Good faith" becomes an element of defenses raisable under UFTA

¹ A complete overview of the UFTA is contained in the summary that accompanied this comparison.

Section 8. Also, "reasonably equivalent value" does not "include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." "Fair consideration" under UFCA does not explicitly exclude such an unperformed promise, and there is a split in authorities as to whether such promises are or are not "fair consideration." Generally, under UFTA, "reasonably equivalent value" is to be considered from the point of view of the creditor. Would the value received in the transfer be available to satisfy the debt?

Section 3(b) of the UFTA deals specifically with the problem raised by Durrett v. Washington National Insurance Company, 621 F.2d 201 (5th Cir. 1980), in which a foreclosure sale of a debtor's property under a mortgage was held a fraudulent transfer when the sale resulted in a recovery of less than 70% of the property's value. Section 3(b) of UFTA provides that "reasonably equivalent value" results when a properly conducted foreclosure sale takes place, no matter the amount recovered. UFCA includes no comparable rule.

UFTA Section 3(c) defines "present value." No similar rule is included in the UFCA.

4. UFTA Section 4(a) combines Sections 5, 6 and 7 of UFCA with clarifications. Section 4(b) of UFTA is new. Section 4 of UFTA generally provides for those actions that are fraudulent to present and future creditors. A future creditor under this Section is, simply, one whose claim "arose . . . after the transfer was made or the obligation incurred."

Section 4(b) lists a series of factors that may be considered to determine the issue of intent under Section 4(a)(1). The list of factors includes most of the badges of fraud construed by courts over the history of the UFCA and predecessor legislation. The list is non-exclusive.

5. UFTA Section 5 provides for transfers fraudulent to creditors only. Section 5(a) is derived from Section 4 of the UFCA. Section 5(b) is new, and identifies a kind of transfer, the "insider" transfer, that is not specifically a fraudulent transfer in the UFCA. The "insider" transaction in Section 5(b) of the UFTA is derived from prior case law. An "insider" is defined in Section 1(7) of the UFTA and includes relatives or family members, partners, a corporate director, and the like.

In part, Section 8 of the UFCA is subsumed in

Section 5(b) of the UFTA. Section 8 of the UFCA deals with transactions between partners and with a person not a partner that results in the insolvency of the partnership. Although partners are "insiders" under the UFTA, liability occurs when an insider "had reasonable cause to believe that the debtor was insolvent." Under Section 8(a) of the UFCA, a partner was, per se, liable, a rule deemed unduly favorable to partnership creditors and unduly burdensome to a partner's creditors. UFTA has no specific sections dealing with partnership transfers such as Section 8 of the UFCA.

6. Section 6 of the UFTA is entirely new. It was created to eliminate questions about the time a transfer is made or an obligation is incurred.

7. Section 7 of the UFTA incorporates Sections 9 and 10 of the UFCA. The UFTA makes no distinction between claims of creditors that have matured as opposed to those that are unmatured, as the UFCA does. Remedies under Section 7 are available to all creditors. Section 7(a)(2) provides for attachment, subject to constitutional constraints. But attachment is offered as an alternative remedy in the UFTA because of the uncertainty over the constitutional problems. A jurisdiction may reject Section 7(a)(2) without impairing uniformity, therefore.

8. Section 8 of the UFTA is entirely new. The UFCA does not provide for transferee defenses and protection of transferee interests. Note that good faith is an element of the defense established in Section 8(a).

9. UFTA Section 9 is new. It establishes statutes of limitations, a subject not addressed at all in the UFCA.

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Exhibit # 4
3/12/91 SB 7

TELEPHONE 252-4101
AREA CODE 408
HORTON A. KOESSLER
OF COUNSEL

January 16, 1991

VIA TELEFAX

Senator Bruce D. Crippen
Capitol Station
P. O. Box 156
Helena, MT 59620

RE: Senate Bill No. 7: "An Act Replacing the Uniform
Fraudulent Conveyances Act, etc."

Dear Senator Crippen:

My legal practice primarily involves debtor/creditor, bankruptcy and collection matters. In my practice, I have regular contact with the Uniform Fraudulent Conveyances Act, and the exemption, voidable preference and fraudulent conveyance provisions of the Bankruptcy Code. In the foregoing context, I have reviewed Senate Bill No. 7 and believe it to be flawed in several respects.

I have three principal objections to the language of Senate Bill 7. First, I believe the definition of "debt" to be too broad and unworkable because the definition of "claim" broadly includes unliquidated, contingent and disputed obligations. Secondly, the definition of "insolvency" in Senate Bill 7 seems to me overbroad and unworkable insofar as it would include in "debts" all disputed and contingent obligations. The "insolvency" definition is also inconsistent with the definition of "insolvency" in Section 101(31) of the Bankruptcy Code. Thirdly, Section 4(2) of SB 7, regarding value, seems to insulate from examination any foreclosure sale or execution of a power of sale regardless of the relative disparity between the obligation owed and the value of the debtor's interest in the property foreclosed.

I also find the proposed statute vague in its definition of "property", its use of the term "substantially all" in Section 5(2)(e); use of the term "shortly after" in Section 5(2)(i); and use of "shortly before or shortly after" in Section 5(2)(j).

Under the proposed statute, "debt" means liability on a claim. A "claim" includes, however, a right to payment whether or not disputed. A purported debtor would not seem under current law to be liable on a claim disputed in good faith until the dispute is resolved. Under the proposed statutory scheme, even

"claims" asserted in bad faith or those subject to bona fide dispute are included in determining the solvency or insolvency of the purported debtor.

The broad "insolvency" definition would also in my view wreak havoc on legitimate commercial transactions. A party who was a guarantor of a fully secured corporate liability which is being and has been paid in its ordinary course by the corporation may nevertheless be deemed insolvent if the contingent liability on the guarantee, when added to the guarantor's other obligations, causes his liabilities to exceed his assets.

The "insolvency" definition under the Bankruptcy Code compares "debts" with the debtor's "property". The "insolvency" definition in Senate Bill 7 compares "debts", broadly defined, with the debtor's "assets," a term much more narrow than "property". Any significant guaranty obligations, suretyship, or other contingent liability, secured by a lien on the debtor's property, may render the debtor insolvent under the proposed definition, regardless of the fact that the obligation guaranteed is fully secured by property of the primary obligor.

Also of concern to me is the potentially unsettling effect the proposed law may have on legitimate transactions with those broadly defined as "insiders" for four or more years. Under the Bankruptcy Code, preferential transfers are voidable for 90 days as to third parties and one year as to insiders; while fraudulent conveyances are subject to a two year limitation under current law. Four years seems too long.

After comparing the proposed law with the existing Uniform Fraudulent Conveyances Act, I remain convinced the existing law fills the need for creditor protection adequately without introducing the vagueries and commercial uncertainty I see likely under the proposed law. I will be pleased to expand on the foregoing views if requested to do so.

Sincerely,

SWEENEY & DOAK

Jon E. Doak

JED:lca

MAZUREK

UNIFORM FRAUDULENT TRANSFER ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS NINETY-THIRD YEAR
IN KEYSTONE, COLORADO
JULY 27 - AUGUST 3, 1984



WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association
Detroit, Michigan, February 18, 1985

most of the cities, which is the county fair, why doesn't the committee provide a definition in the bill that says, "amusement games are exempted with some reasonable explanation as to what amusement games are" and skip about 5 pages of the bill?

Ms. Menzies stated that the bill does provide a definition of what an amusement game is. The bill, as drafted, did not give the Justice Department the authority. She stated that it was through the gambling industry that the suggestion was made to draft a bill such as this bill. The purpose was for uniformity of amusement games throughout the counties of Montana. She felt that was a reasonable approach by the Department.

REP. BROWN asked Ms. Menzies if it seems that the main reason the Department is dealing with the amusement game issue is because of the Attorney General's inability to interpret the statutes on gambling in the state of Montana? Ms. Menzies stated that there is a statute on the book now that provides that the department can prohibit activities that are not specifically authorized. The Attorney General had no choice but to make the decision he did.

REP. BROWN asked Ms. Menzies if that is the case, what is your comment as to whether or not the statue should be changed in the existing gambling law the way the committee amended Sen. Brown's Constitutional Amendment Bill to take the Attorney General out of that position to have the statue say it is illegal otherwise it is legal in the state of Montana. Ms. Menzies felt that would be a worthy option that should be considered.

Closing by Sponsor:

SEN. WILLIAMS stated that the bill isn't a cure all but it is a good bill that he felt everyone could live with and asked the committee to pass it out to the House Floor.

EXECUTIVE ACTION ON SB 304

Motion/Vote: REP. RICE MOVED SB 304 BE CONCURRED IN. Motion carried unanimously.

EXECUTIVE ACTION ON SB 7

Motion: REP. TOOLE MOVED SB 7 BE CONCURRED IN.

Discussion:

John MacMaster stated that Sen. Mazurek offered some clean-up amendments. One is on page 6, line 8, striking "assets" and insert the word "property". The second amendment is on the same

line by striking "do" and insert the word "does". The third amendment is on page 6, subsection 3 would be struck, which is lines 13-15.

Motion/Vote: REP. RICE moved to amend SB 7 with the amendments explained by John MacMaster. Motion carried.

Motion/Vote: REP. RICE MOVED SB 7 BE CONCURRED AS AMENDED.
Motion carried unanimously.

EXECUTIVE ACTION ON HB 752

Motion: REP. TOOLE MOVED HB 752 DO PASS.

Motion: REP. TOOLE moved to amend HB 752 by changing the 90 day hearing period to 30 days, to mandate a hearing which both husband and wife appear to finalize the papers and to leave the filing fees as is in existing law.

Discussion:

CHAIRMAN STRIZICH stated that in addition to those amendment, John MacMaster has suggested a technical amendment to page 2, which deals with how automobiles are defined.

John MacMaster stated that on page 2, changing line 9 to read, "a motor vehicle with a rated carry load of a persons property of 1 ton or less" and do the same thing on lines 11 and 14.

REP. TOOLE stated that he would accept that as a friendly amendment to his amendment.

REP. MEASURE stated that he resists the amendments. He felt that when a couple is in a position that they want to get a divorce they shouldn't have to wait 30 days. He stated that if they find they want to be married again, they can go to the clerk and pay the \$60 for a marriage license.

Vote: Motion carried 17 to 3 with Rep's: Johnson, Wyatt, and Measure voting no.

Discussion:

REP. RICE stated that he was concerned about the phrase "to her knowledge" in regards as to whether the wife may be pregnant at the time of her divorce. He stated that in section 6, at the bottom of the page 4 and the top of page 5 he felt the that if the wife did not believes she was pregnant it does not allow the decree to be set aside if she is.

HOUSE OF REPRESENTATIVES

JUDICIARY COMMITTEE

ROLL CALL

DATE 3-13-91

NAME	PRESENT	ABSENT	EXCUSED
REP. VIVIAN BROOKE, VICE-CHAIR	/		
REP. ARLENE BECKER	/		
REP. WILLIAM BOHARSKI			
REP. DAVE BROWN	/		
REP. ROBERT CLARK	/		
REP. PAULA DARKO	/		
REP. BUDD GOULD	/		
REP. ROYAL JOHNSON	/		
REP. VERNON KELLER	/		
REP. THOMAS LEE	/		
REP. BRUCE MEASURE	/		
REP. CHARLOTTE MESSMORE	/		
REP. LINDA NELSON	/		
REP. JIM RICE	/		
REP. ANGELA RUSSELL	/		
REP. JESSICA STICKNEY	/		
REP. HOWARD TOOLE	/		
REP. TIM WHALEN	/		
REP. DIANA WYATT	/		
REP. BILL STRIZICH, CHAIRMAN	/		

HOUSE STANDING COMMITTEE REPORT

March 13, 1991

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that Senate Bill 7 (third reading copy -- blue) be concurred in as amended .

Signed: _____
Bill Strizich, Chairman

Carried by: Rep.Toole

And, that such amendments read:

1. Page 6, line 8.

Strike: "Assets"

Insert: "Property"

Strike: "do"

Insert: "does"

2. Page 6, lines 13 through 15.

Strike: subsection (3) in its entirety